

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation
of the

DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING

v.

KURT D. BOTTOMS, as a Managing Agent and
an Individual, doing business as KURT
BOTTOMS REAL ESTATE BROKER, business
form unknown,

Respondent.

SILVERLENE BATES,

Complainant.

Case Nos.

E 200304-M-0192-00-s

E 200304-M-0192-01-s

E 200304-M-1663-00-s

C 04-05-009

05-03-P

ORDER NUNC PRO TUNC

The Fair Employment and Housing Commission corrects the following error in its Final Decision. The Commission adopted its Final Decision in this matter on March 30, 2005, the date of its Commission meeting, rather than April 5, 2005, the date the final decision was mailed. The April 5, 2005, mailing date remains the date used to calculate the time for seeking reconsideration and when the decision is final.

DATED: May 12, 2005

ANN M. NOEL

Acting Executive and Legal Affairs Secretary

On behalf of the

Fair Employment and Housing Commission

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DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, title 2, section 7435, subdivision (a). The Commission also hereby, nunc pro tunc, corrects the following typographical errors: page 13, line 35, should read "repeatedly" in lieu of "repeated" and page 18, line 30, should read "§ 12970" in lieu of "§ 2970."

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and

related papers shall be served on the Department, the Commission, respondent, and complainant.

DATED: April 5, 2005

GEORGE WOOLVERTON

HERSCHEL ROSENTHAL

JOSEPH JULIAN

LINDA NG

PATRICK ADAMS

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PROPOSED DECISION

Administrative Law Judge Ann M. Noel heard this matter on behalf of the Fair Employment and Housing Commission on October 26 through 28, 2004, in Oakland, California. Lillian Tabe, Staff Counsel, represented the Department of Fair Employment and Housing. Robert Desmet, Esq., represented respondent Kurt D. Bottoms. Complainant Silverlene Bates and respondent Kurt D. Bottoms attended the hearing.

The Commission received the hearing transcript and the case was submitted on December 8, 2004.

After consideration of the entire record, the Administrative Law Judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On July 30, 2003, Silverlene Bates (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) against “Kurt Do. Bottoms.” The complaint alleged that in the preceding year complainant’s former employer, Kurt D. Bottoms, subjected her to physical, verbal, and visual sexual harassment constituting a hostile work environment resulting in her constructive discharge. On May 3, 2004, complainant amended the complaint by changing the name of her employer to Kurt D. Bottoms and filed a second, amended complaint against Bottoms alleging that, within the preceding year, Bottoms subjected her to an act of violence and threats of violence because of her sex.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h), of the Fair Employment and Housing Act (FEHA). (Gov. Code §12900, et seq.) On July 29, 2004, Wanda J. Kirby, in her then official capacity as Interim Director of the Department, issued an accusation against Kurt D. Bottoms, as a managing agent and an individual, doing business as Kurt Bottoms Real Estate Broker, business form unknown (respondent Bottoms).

3. The Department’s accusation alleged that respondent Bottoms unlawfully subjected complainant to physical, visual and verbal harassment in the workplace because of her sex, thereby creating a hostile, intimidating, and offensive work environment which resulted in complainant’s constructive discharge. The accusation also alleged that Bottoms failed to maintain and enforce an effective sexual harassment policy. The Department alleged that Bottoms’ conduct violated Government Code section 12940, subdivision (j)(1). The Department further alleged that Bottoms threatened complainant with violence because of her sex, female, in violation of the Ralph Civil Rights Act, Civil Code section 51.7, as incorporated into Government Code section 12948.

4. At all relevant times, respondent Bottoms owned and managed rental units from an office in his home at 210 Willard Avenue, Richmond, California (210 Willard). In 2003 and until May 2004, Bottoms was a California licensed real estate broker. At all relevant times, Bottoms employed from one to five persons in his real estate business, Kurt Bottoms Real Estate. Bottoms was an “employer” within the meaning of Government Code section 12940, subdivisions (j)(1) and (j)(4)(A), and a “person” within the meaning of Civil Code section 51.7 and Government Code section 12940, subdivision (j)(1).

5. In early 2003, respondent Bottoms and his wife were dissolving their 14-year marriage. Bottoms decided that he needed clerical assistance to prepare the community property settlement, as well as domestic assistance cooking and cleaning. Around mid-January 2003, respondent Bottoms hired complainant to work for him as a personal assistant in these tasks at his 210 Willard office. Bottoms had converted a front bedroom of his home

into an office and complainant worked at a desk near Bottoms. Bottoms paid complainant \$10 per hour.

6. Complainant assisted respondent Bottoms both in his office and housekeeping tasks. The first few weeks of complainant's and respondent Bottoms' working relationship were professional and cordial. Complainant worked approximately 40 hours per week and upgraded Bottoms' computer system, answered Bottoms' phone, collected rent from Bottoms' tenants, did light housekeeping, shopped and cooked some meals for Bottoms. Bottoms told complainant "divorce stories" about his estranged wife. At the time, complainant lived with her fiancé Johnny Davis and her 20 year-old son Randy DeBarge in an apartment in Oakland.

7. In addition to complainant, respondent Bottoms employed two brothers, Josepho and Jorge Barrera, as maintenance workers. In February 2003, respondent Bottoms hired two additional employees: Keith Harris was hired to install a security system in Bottoms' house, and Steven Pippins to provide security. In addition, Bottoms had Harris provide transport to Bottoms' employees, including complainant, and help complainant collect rent from tenants. Complainant and Harris became friends while working together.

8. In early February 2003, respondent Bottoms asked complainant to drive him to a Lake Tahoe-area resort for an overnight business trip and back to Richmond the next day. Bottoms offered to pay complainant \$600 for driving and to reimburse her for overnight accommodations. Bottoms told complainant that he needed to meet with his close friend, Darryl Gardner, at Lake Tahoe about a business loan. Complainant obtained assent from her fiancé, Johnny Davis, for the overnight trip, assuring him that the trip was solely for business, and that she would have separate accommodations from Bottoms.

9. Upon arrival at the Lake Tahoe resort, complainant was disconcerted to discover that only one cabin was reserved for both Bottoms and complainant and that the cabin's one bed had rose petals strewn over it spelling, "I love you." Complainant told Darryl Gardner, who showed them the cabin and had arranged the flowers, that her relationship with Bottoms was strictly professional. Bottoms insisted that they could share the bed and that he would leave her alone. Complainant declined and instead slept on the sofa.

10. The next morning, Bottoms spied on complainant while she bathed. Complainant confronted him and he apologized.

11. At lunch that day, Bottoms yelled at complainant for embarrassing him in front of Gardner by telling his friend that Bottoms and complainant had strictly a professional relationship. When complainant retreated to the cabin to escape Bottoms' yelling, he followed her and continued to berate her. Complainant asked Bottoms if he thought that she was a whore whom he could pay for sex. Bottoms responded by calling complainant a "fucking stupid bitch" with poor taste in men. Bottoms told her that she should sleep with him, describing himself as a "stud," the "King of Richmond."

12. Complainant was extremely upset by respondent Bottoms' conduct and epithets. She felt threatened by the level of Bottoms' anger and frightened by the isolation of the snowbound, remote cabin, perceiving that she would have difficulty escaping if Bottoms' conduct escalated into violence. Complainant called Gardner to give her a ride to the airport. When Gardner arrived, Bottoms continued, in Gardner's presence, to yell at complainant and call her names. Gardner paid complainant the \$600 Bottoms had promised her and had an employee drive complainant to the Reno airport. Complainant flew home alone.

13. Complainant's fiancé Johnny Davis picked her up at the Oakland airport. Complainant was crying and distraught. She told him about respondent Bottoms' conduct at Lake Tahoe.

14. Respondent Bottoms returned to his office several days later and complainant returned to work. Bottoms apologized to complainant and also told her that she owed him an apology and had not earned the \$600. Complainant said that she only wanted a professional relationship. Bottoms agreed to this. For the next week, Bottoms treated complainant professionally and during this time complainant worked long hours assisting Bottoms with paperwork for his property settlement.

15. Around the second week of February 2003, Bottoms lessened complainant's housekeeping duties and increased her office work responsibilities. Bottoms gave complainant authority to show property and enter into rental agreements on his behalf with tenants. He offered to pay for her to go to real estate school. He took her to the brokerage office where he worked and introduced her to everyone there as his secretary and assistant. Bottoms began flirting with complainant, telling her that she was beautiful and sexy, with beautiful lips, a nice figure and a nice "butt." He told her that she had poor taste in men and would be better off without her fiancé, describing Johnny Davis as a "loser." Bottoms stated that complainant should, instead, be with him.

16. A few days after February 14, 2003, Valentine's Day, respondent Bottoms asked complainant to accompany him to Sparks, Nevada on another out-of-town business trip. Bottoms stated that he wanted to purchase a Nevada property and needed to go there to close the deal. Complainant agreed to go but only if she was accompanied by her fiancé Johnny Davis. Bottoms agreed to have Davis accompany them. While in Nevada, Bottoms bought complainant an expensive bracelet as a Valentine's Day gift. This created tension between complainant and Davis.

17. After complainant returned from Nevada, respondent Bottoms asked complainant to work long hours and she frequently worked 11 to 12-hour days for Bottoms, returning home late. Bottoms repeatedly called her at home, often late at night.

18. Near the end of February 2003, Johnny Davis and complainant argued. Davis surmised, incorrectly, that complainant and respondent Bottoms were having an affair

because of complainant's long work hours, Bottoms' numerous telephone calls, and Bottoms giving complainant an expensive bracelet. Davis insisted that complainant and her 20-year old son, Randy DeBarge, move out of the apartment.

19. Complainant and her son had nowhere to live and little money. DeBarge has a communication disability and is unable to live on his own. They were forced to sleep in complainant's car for several nights. Complainant asked Bottoms if he had any rental property available that she could rent from him in exchange for work. Bottoms said he thought that he would have a rental available March 1, 2003, and offered to let her and her son sleep in his office in the interim. Complainant slept on the office sofa and her son slept on the floor.

20. The next day, Bottoms told complainant that she should "take care of him" and "fuck" him or he would throw her and her son out of his house. When she refused, he called her stupid, a "bitch," a "cunt," and a "whore." Complainant ran out of his house and down the street to seek assistance from Pastor Wyndford Williams, a Pentecostal minister whose church was close by. Bottoms attended Pastor Williams' church. Complainant, crying hysterically, told Williams that she wanted to have solely a professional relationship with Bottoms but he was pressuring her for sex. Williams offered to speak with Bottoms on complainant's behalf.

21. Pastor Williams met with Bottoms and complainant. Bottoms told Pastor Williams that he did not agree with the church's prohibitions against premarital sex and that he needed "to get laid." Bottoms told Pastor Williams that he did not understand why complainant would not sleep with him since she had had "sex with other men before" and was sleeping on his sofa. Pastor Williams responded that complainant had explained to Bottoms that she did not want a sexual relationship, merely a work relationship. Pastor Williams prayed with complainant and Bottoms. Pastor Williams admonished Bottoms that if he cared about complainant as a person, he would not call her names or treat her inappropriately. Bottoms agreed with Pastor Williams. For approximately a week thereafter, Bottoms treated complainant in a professional manner.

22. On March 1, 2003, complainant moved into a rental property owned by respondent Bottoms located at 772 Santa Maria Road, El Sobrante, California [the "El Sobrante house"]. On March 7, 2003, Bottoms and complainant signed a rental agreement stating that the rent would be \$1,000 per month, plus a \$1,000 security deposit. They agreed that Bottoms would pay complainant \$450 per week for her secretarial wages, of which \$250 would be credited towards her rent and the remaining \$200 would be given to her by check. Complainant and Bottoms signed two separate employment agreements, in April and May, 2003, both of which memorialized this payment arrangement. Complainant agreed to pay Bottoms an additional \$100 each month from her wages towards the \$1,000 security deposit.

23. Thereafter, complainant lived in the El Sobrante house with her son, Randy DeBarge. Bottoms gave DeBarge a job doing landscaping and assisting the Barrera brothers in painting and repairs.

24. Complainant was upset about the breakup with her fiancé, crying everyday. Bottoms' treatment of her compounded her distress. She worked very hard for him and yet he treated her "not like a human being, like nothing." Complainant's self esteem plummeted. She felt that his treatment of her—calling repeatedly, demanding long hours, and buying her an expensive bracelet—contributed to her breakup with her fiancé. Without Johnny Davis, she was solely dependent on Bottoms for employment and shelter. Knowing this, she felt that Bottoms had taken advantage of her and would continue to pressure her to sleep with him.

25. Complainant continued to talk with and see Johnny Davis after she moved into the El Sobrante house. Bottoms told complainant that he did not want her to have visitors at the El Sobrante house, specifically telling her that he did not want Davis there. As a result, for a time, complainant did not let Davis visit her home. Bottoms' restrictions made complainant feel "like a prisoner" in her own home.

26. In March and April 2003, respondent Bottoms repeatedly called complainant after working hours at her El Sobrante home, from as early as 5 a.m. in the morning and at times after midnight and on weekends. Bottoms told her that if she wanted to work in real estate, she needed to be available "24-7," meaning 24 hours a day, seven days a week. Although the calls were ostensibly work-related, Bottoms demanded to know "24-7" where complainant was, what she was doing and who was with her at her house. He asked her if he could come over, at times in the middle of the night and complainant told him no. Bottoms told complainant that he was watching her.

27. On one occasion, respondent Bottoms called when Johnny Davis was with complainant at her home. Bottoms told complainant that Davis had to leave. Davis, however, stayed. Shortly thereafter, someone threw a rock through the front window. Later, Bottoms suggested to complainant that she needed to fix the broken window in her house because "someone could do a drive-by."

28. As a result of respondent Bottoms' frequent calls and remarks, complainant felt under constant surveillance and terrorized by Bottoms. She stopped answering her telephone and let voicemail take the messages. Bottoms thereafter repeatedly left her numerous messages stating that if she did not take his calls, he would fire her. Complainant changed her telephone number twice in April 2003 to avoid Bottoms' calls.

29. On numerous occasions, respondent Bottoms told complainant that if she contacted the police to file a complaint about his behavior, Bottoms could have an acquaintance come from Mexico and execute both her and members of her family and "no one would ever know." Bottoms told her that he had used this man before for this purpose. Bottoms also

told complainant that he could pay one of his maintenance workers \$20 to have her throat slit and that he would have both Keith Harris and Johnny Davis murdered to “get rid of them” so that Bottoms would have unrestricted access to complainant. Bottoms made similar death threats directly to Harris and Davis, telling each man that he could have them killed. Complainant believed all of Bottoms’ threats and was intimidated and terrified, both for herself, her family, and for Harris and Davis. As a result of Bottoms’ threats, for months complainant was too frightened to file a complaint against Bottoms.

30. During the month of April 2003, respondent Bottoms came over to complainant’s house after midnight unannounced and uninvited at least three times. Bottoms stated to complainant that he needed to talk with her about work. Each time, complainant refused to open her door. One morning, complainant found Bottoms in her living room, even though her doors had been locked. Complainant immediately changed the locks on her house. On two occasions thereafter, once at 9 p.m. and once at 4 a.m., Bottoms unsuccessfully tried to open complainant’s door with his old house key while she was at home. On several occasions, Bottoms parked his truck near complainant’s house late at night to watch her house and to see if anyone was visiting her. On one occasion at three o’clock in the morning, Bottoms called Keith Harris and asked him to write down Johnny Davis’ license plate number, stating that he was not going to “stand” for Davis staying at “his” house.

31. Complainant felt that Bottoms was stalking her and she did not feel safe in her own home. As a result, complainant asked her brother Marvin Lidel to move in with her for protection. Bottoms obtained Lidel’s cell phone number and began calling him frequently when Bottoms could not reach complainant on her telephone number. Complainant also began staying at her fiancé’s apartment again, and Bottoms frequently called her there.

32. In March and April 2003 at the worksite, respondent Bottoms alternated between flirting and abusive behavior toward complainant. Bottoms constantly complemented complainant’s appearance, telling her that he liked her “butt,” her lips and her figure. He told her that she had poor taste in men and should be with him instead. He told her that he was only going to give her a few more months to sleep with him. Mondays were often the worse day for complainant because Bottoms was angry that she had not answered or returned his calls over the weekend. When upset with complainant, Bottoms called complainant a “bitch” or a “whore.” Bottoms’ employee Keith Harris often overheard these comments and told Bottoms not to call complainant names. Bottoms became jealous of complainant’s friendship with Harris and suspected that they were lovers.

33. In the beginning of April 2003, respondent Bottoms made physical overtures to complainant: he asked complainant for hugs, grabbed her buttocks on three occasions, and touched her thigh two or three times while talking to her. Each time, complainant told Bottoms not to touch her and told him that he was harassing her. Bottoms told her that he did not mean anything by his behavior and told her if she did not like it, to “take me to court.” Bottoms also warned complainant not to contact the police because he was the “King of Richmond” and could do whatever he wanted.

34. On a Monday in April 2003, while riding in a car together, respondent Bottoms and complainant quarreled about whether Keith Harris had made disparaging remarks about her son, Randy DeBarge. Complainant did not believe Bottoms' reports that Harris had demeaned her son, and refused to listen to what Bottoms had to say. Bottoms yelled at complainant, calling her a "stupid bitch." She attempted to get out of the car at an intersection. Bottoms grabbed at complainant and snatched her glasses when she tried to get away from him. Complainant grabbed a flashlight from the car to defend herself. Complainant jumped out of the car, crying and hysterical. She called Johnny Davis to pick her up.

35. At some point in May 2003 at the worksite, respondent Bottoms told Keith Harris in complainant's presence to bring a bottle of Hennessey's liquor and to come pick up his "bitch," referring to complainant, because it was time that Bottoms got his "fair share" from her.

36. By May and continuing in June 2003, Bottoms made repeated overt demands for sexual relations with complainant. Bottoms told complainant that he wanted his "fair share" from her, telling complainant that he wanted to have sexual intercourse with her. Bottoms offered complainant money to give him massages and asked her to accompany him to a hotel. He told her, "If you need something, you know how it is, no honey, no money." Complainant refused his overtures.

37. As a result of respondent Bottoms' conduct, complainant felt trapped in her job and her house. When she started working for respondent Bottoms, she thought the job was going to be great and that she would learn from Bottoms how to be a real estate broker. Instead, the position became "the job from hell." She had no money to move. Complainant did not understand why Bottoms called her names and pressed her for sex. She continued to hope that the situation might change and that Bottoms would appreciate all of the work that she did for him. She pleaded with Bottoms to cease his sexual overtures and abuse. Bottoms told her that he was not going to stop.

38. From March 2003 through June 2003, between two to three times a week, complainant met with Pastor Williams to talk about respondent Bottoms. Complainant told Pastor Williams that Bottoms constantly demanded sex from her. Pastor Williams observed that complainant appeared "very broken" in these conversations, "always crying," and was "upset, jittery, nervous, and fearful." During the same time period, Pastor Williams also met together with complainant and Bottoms on approximately five occasions and counseled both of them on their interactions. Each time, Bottoms agreed not to harass complainant and not to ask her for a sexual relationship.

39. In early June 2003, Bottoms put up a large sign in the office which stated "No honey, no money." Complainant asked him what he meant by the sign. He told her that she knew what it meant. Complainant told him that she was just there to work for him. Bottoms

told complainant that she “owed” him and that he wanted his “fair share.” Bottoms told complainant that her time was running out; she needed either to sleep with him or to leave. Complainant told him that she was looking for another job.

40. In June 2003, respondent Bottoms hired a new security guard, Darren Williams. Williams wore a gun in the office and Bottoms wore a knife.

41. On June 13, 2003, respondent Bottoms, Darren Williams, and complainant were working in the front office. Williams wore his gun. In front of Williams, Bottoms repeatedly demanded that complainant have sex with him. Williams supported Bottoms and asked complainant why not just “take care of the boss” and “give the boss some.” Complainant was terrified, fearing that the pair might use violence to force her to have sex with Bottoms. Complainant left the office and did not return to work for Bottoms. Complainant’s last day of employment with Bottoms was June 13, 2003.

42. On or about June 15, 2003, respondent Bottoms attempted to come into complainant’s house at 4 a.m. to give her a 24-hour notice to move. He could not enter, however, because complainant had changed the locks. Complainant was afraid that respondent Bottoms would harm her, so she put mattresses in front of her bedroom windows to protect herself.

43. In early July 2003, complainant sought a restraining order against Bottoms in Contra Costa Superior Court, case number M03-0802. Pastor Williams signed a declaration in support of the application for a restraining order. Bottoms contacted Pastor Williams and urged him to retract the declaration. Bottoms told Pastor Williams, “Pastor, don’t go against me. If you go against me, you’re going down.” Pastor Williams refused to retract his declaration. On July 7, 2003, complainant obtained the restraining order which provided that Bottoms was not to contact complainant or to be within 10 yards of her.

44. In July 2003, complainant moved back into her fiancé’s apartment, with the financial assistance of the state’s Victims of Crime program, money made available to her after she filed her restraining order. On July 17, 2003, complainant went to Pastor Williams’ church to pick up her son, Randy DeBarge. Respondent Bottoms, accompanied by his security employee Darren Williams, saw complainant and yelled “There she is.” The two got in Bottoms’ car and chased complainant in her car. At one point, Bottoms’ car blocked complainant’s vehicle. Complainant managed to maneuver her small car around Bottoms’ car and get away. Complainant was “terrified” and filed a report with the Contra Costa County Sheriff’s Office.

45. In August or September 2003, respondent Bottoms contacted complainant through an intermediary, a friend and sometime employee of Bottoms, Jack Scott. Scott indicated that Bottoms wanted to apologize to her. Complainant agreed to meet Bottoms in a public place and took two friends as bodyguards with her. At the meeting, Bottoms did not

apologize but instead told her that she could not win against him because he was “too big,” and that she was playing with fire. Complainant left.

46. In November 2003, complainant and Davis married and in January 2004, they started a scrap metal recycling business together. Complainant’s responsibilities were to do the business paperwork and solicit new clients. Because of her overriding fear of respondent Bottoms, complainant could not concentrate on her paperwork responsibilities. Her ability to generate business was also affected because she found it difficult to leave their apartment and interact with strangers.

47. Respondent Bottoms’ threats to complainant made her fearful and paranoid. She feared that Bottoms or his stand-in would directly harm her, her fiancé Davis or other members of her family. This fear began while she lived in the El Sobrante house but continued through the date of hearing. Through the date of hearing, complainant lived in constant fear, afraid that Bottoms might enter her apartment to harm her, to take papers associated with her Department complaint, or to have her apartment “bugged.” Complainant seldom left her apartment. She feared that Bottoms or someone else might be following her. When complainant arrived home, she had her husband check the house, looking in her closets and under her bed for Bottoms. She had Davis change the locks on the apartment three times because she was fearful that Bottoms had picked the lock and entered their apartment. While complainant worked for Bottoms, he had told her that he could have people’s houses blown up, cars blown up, people set up. Complainant believed him and feared what he would do to her. While living in the El Sobrante house and through the date of hearing, complainant had trouble sleeping and had frequent nightmares.

48. Beginning on August 30, 2004, complainant saw a family therapist, Michael McAdoo, three times regarding her ongoing distress and fear about respondent Bottoms. McAdoo found complainant to be anxious, paranoid, and depressed. He diagnosed complainant’s symptoms as consistent with post-traumatic stress syndrome, especially since her symptoms had not abated for more than a year after her employment with Bottoms ended. McAdoo found it hard to reassure complainant that she was safe and he noticed that she startled easily. McAdoo referred complainant to a psychiatrist for evaluation for medications to manage her anxiety, insomnia, and depression.

49. At hearing, complainant appeared anxious, nervous and depressed. She continued to have nightmares, including one a few days before hearing.

DETERMINATION OF ISSUES

Liability

The Department alleges that respondent Bottoms sexually harassed complainant and failed to take all reasonable steps to prevent harassment from occurring, in violation of Government Code section 12940, subdivision (j)(1). The Department also alleges that Bottoms threatened complainant with violence because of her sex, female, in violation of the Ralph Civil Rights Act, as incorporated into the FEHA at Government Code section 12948.

A. Sexual Harassment

The Department first alleges that respondent Bottoms sexually harassed complainant, in violation of Government Code section 12940, subdivision (j)(1). The Department alleges that respondent Bottoms made unwelcome sexual advances to complainant, conditioned complainant's job upon an exchange of sexual favors, and subjected complainant to unwelcome verbal, physical, and visual harassment, creating a "hostile work environment" for complainant. All of this conduct, if proven, constitutes forms of sexual harassment. (Cal. Code Regs., tit. 2, §§ 7291.1, subd. (f)(1) and 7287.6, subd. (b); *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 459, citing *Weeks v. Baker & McKenzie* (2002) 63 Cal.App.4th 1128, 1146, and *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 607.) The Department may establish a violation under subdivision (j)(1) by proving that respondent engaged in harassment based on complainant's sex and that the harassment created a hostile or abusive work environment, regardless of whether the complainant suffered tangible or economic loss such as a promotion, pay increase, or the job. (Gov. Code, § 12940, subd. (j)(1); *Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 516-517; *Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1413-1414; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 605; *Dept. Fair Empl. & Hous. v. Jarvis* (Jan. 18, 2001) No. 01-02-P, FEHC Precedential Decs. 2001, CEB 1, p. 8 [2001 WL 273486].)

1. Whether Unwanted Sexual Conduct Occurred

Complainant testified that respondent Bottoms engaged in recurrent instances of unwelcome sexual conduct toward her both in the workplace and outside of work from early February 2003 until her last day of employment on June 13, 2003. This conduct included: requests for sex; sexual epithets such as "fucking bitch," "cunt," and "whore"; physical conduct, Bottoms touching complainant's buttocks and thighs; and the office sign echoing his comments of "no honey, no money."

Respondent Bottoms denied most, but not all, of the conduct. He admitted that he called complainant "bitch" at times, but claimed that she also called him names. He admitted

that he admired her physical attributes on occasion, such as her lips. He denied, however, ever making sexual advances, using sexual epithets or touching complainant.

Complainant's testimony is credited over respondent Bottoms' version of events. Complainant was consistent in her testimony, both on direct and cross examination. Complainant's testimony was corroborated in significant part by Department witnesses Johnny Davis, Keith Harris, and Pastor Wyndford Williams, all of whom testified consistently, confirming complainant's account about unwelcome sexual conduct based on such behavior by Bottoms that they personally observed. These witnesses presented as forthright and credible.

Pastor Wyndford Williams' testimony is particularly persuasive, corroborating that Bottoms repeatedly pressed complainant for sex, that these requests were unwelcome by complainant, and that complainant repeatedly conveyed this to Bottoms.¹ Pastor Williams had no motive to fabricate his testimony and was on good terms with both complainant and respondent Bottoms. Pastor Williams talked with complainant continuously during the time of her employment, listened regularly to her complaints about Bottoms' conduct, and counseled both of them together on five occasions. Bottoms admitted his pursuit of complainant in Pastor Williams' presence. On each of the five occasions, Bottoms promised to stop his unwelcome sexual conduct after Pastor Williams' intervention.

Bottoms did not convincingly rebut this strong, consistent testimony. He admitted to some of the behavior—calling complainant repeatedly a “bitch” and placing the sign “no

¹ Respondent Bottoms objected to the introduction of Pastor Wyndford Williams' testimony, asserting that any testimony about conversations with complainant and Bottoms together should be excluded under Evidence Code section 1032, the penitential communication privilege. That privilege provides, in relevant part, that any “communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman” who in the course of his denomination is authorized or accustomed to hear such communications and, under the tenets of his denomination, has a duty to keep such communications secret, shall be privileged. (Evid. Code §1032.) Yet, Pastor Williams did not testify about any conversations that he had alone with Bottoms. Rather, Pastor Williams testified about conversations during meetings Williams had either with complainant and respondent Bottoms together or alone with complainant.

Respondent Bottoms argued that the communications between Pastor Williams and complainant were in the nature of marital counseling, with Bottoms and complainant seeking assistance from Pastor Williams on how to improve their relationship. Thus, Bottoms argued, the communications should be excluded. Yet, the penitential communication privilege in California does not apply to communications made to a pastor acting as a marriage counselor. (*See Simrin v. Simrin* (1965) 43 Cal.App.2d 90.”)

Respondent Bottoms also objected on the basis that since Pastor Williams was his spiritual advisor and minister with whom Bottoms met independently to discuss in confidence his relationship with complainant, Pastor Williams should not be able to testify about any other conversations that he had with complainant and Bottoms. Bottoms cited no authority to support this interpretation of the penitential communication privilege.

Because Bottoms' communications to Pastor Williams were made in the presence of a third party, complainant, under Evidence Code section 1032, the penitential communication privilege does not apply. Therefore, all of Pastor Williams' testimony is admissible.

honey, no money” in his office. In both instances, he had non-sexual interpretations for his behavior. Bottoms otherwise denied that he sexually harassed complainant, but his denials were not convincing.²

Furthermore, in contrast to complainant and Pastor Wyndford Williams, Bottoms’ testimony was inconsistent and contradictory. For example, on the first morning of hearing, Bottoms testified that complainant was an independent contractor, performing mostly housework. When presented with his signed response to the Department’s complaint stating that he employed complainant for the dates indicated in the Department’s complaint, he claimed that the information was incorrect and blamed his attorney. And, when presented with copies of the two employment contracts complainant had signed in April and May 2003, Bottoms admitted that complainant did, in fact, perform office work, for which he paid her wages.

Complainant credibly testified that while she and respondent Bottoms began their working relationship in January 2003 on professional terms, by early February 2003, Bottoms began trying to initiate a sexual relationship with complainant. His first efforts were during the Lake Tahoe business trip. When complainant rebuffed respondent Bottoms’ sexual advances, Bottoms’ seductive behavior devolved to sexual epithets, calling her a “fucking stupid bitch,” and crude demands for sex. Thereafter, until complainant left her job on June 13, 2003, Bottoms repeatedly asked or demanded sex from complainant and called her sexual epithets, including “bitch,” “cunt” and “whore.” These terms are inherently gender-specific, sexual references and “intensely degrading” to women. (*Dept. Fair Empl. & Hous. v. Nulton* (Sept. 16, 2003) No. 03-10-P [2003 WL 22733897].)

Respondent Bottoms also grabbed complainant’s buttocks on three occasions, and touched her thigh two or three times when he talked with her. In addition, respondent Bottoms placed a sign in his office, which stated “no honey, no money.” Although Bottoms admitted placing the sign in his office, he claimed that it was his attempt to get complainant to do the job which he was paying her for, not another overt demand for sex. Complainant’s co-worker, Keith Harris, however, credibly corroborated complainant’s interpretation that Bottoms was threatening complainant’s job if she did not have sex with him. Complainant’s and Harris’ version is credited over Bottoms’.

Complainant repeated told respondent Bottoms that his conduct was unwelcome, imploring him to stop. Complainant made these requests in private and in the presence of Pastor Wyndford Williams and Keith Harris, both of whom corroborated her testimony.

Accordingly, the Department has proven that respondent Bottoms subjected complainant to unwelcome sexual conduct based on her sex, as credibly testified to by complainant and described in the Findings of Fact.

² Respondent Bottoms’ sole witness, Jack Scott, an occasional worker for Bottoms, claimed to have witnessed no harassing behavior, despite a earlier signed declaration to the contrary, which at hearing he denied ever signing. Accordingly, he was found not to be credible.

2. Quid Pro Quo

The Department alleged that respondent Bottoms linked complainant's keeping her job with agreeing to have sex with him. Bottoms denies this.

Conditioning employment on sexual relations, termed "quid pro quo" or "this for that" is a form of sexual harassment. (See *Henson v. City of Dundee* (11th Cir.1982) 682 F.2d 897, 908; *Hicks v. Gates Rubber Co.* (10th Cir. 1989) 833 F.2d 1406, 1413; *Fisher v. San Pedro Community Hosp.*, *supra*, 214 Cal. App. 3d at p. 607.)

Complainant credibly testified that Bottoms told her that she "owed" him, that he wanted his "fair share" and that she either needed to have sex with him or to leave her job. Bottoms also linked complainant's continued employment with acceding to his demands for sexual relations with his "no honey, no money" sign. Complainant's testimony is corroborated both by her co-worker Keith Harris' and by Pastor Wyndford Williams' testimony. The Department has established that respondent Bottoms engaged in quid pro quo harassment by linking complainant's continued employment with a sexual relationship with him.

3. Hostile Work Environment

Complainant, like all employees, is entitled to the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§ 7286.5, subds. (f), and (f)(3), and 7287.6, subd. (b); *Dept. Fair Empl. & Hous. v. Jarvis*, *supra*, 2001 CEB 1, at p. 7; see also *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21-22; *Meritor Sav. Bank, FSB v. Vinson* (1986) 477 U.S. 57, 65; *Birschtein v. New United Motor Manufacturing*, *supra*, 92 Cal.App.4th at p. 1000; *Sheffield v. Los Angeles County Dept. of Social Services* (2003) 109 Cal.App.4th 153, 161-162 [employees' entitlement to a workplace free from "discriminatory intimidation, ridicule, and insult"].)

In cases alleging hostile work environment sexual harassment, the Department must establish that the unwelcome conduct is sufficiently severe or pervasive to alter the conditions of the complainant's employment and create an intimidating, oppressive, hostile, abusive or offensive work environment, or otherwise interfere with her emotional well-being or ability to perform her work. (*Birschtein v. New United Motor Manufacturing*, *supra*, 92 Cal.App.4th at p. 1000; *Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at pp. 516-520; *Fisher v. San Pedro Peninsula Hospital*, *supra*, 214 Cal.App.3d at p. 608; *Dept. Fair Empl. & Hous. v. Jarvis*, *supra*, 2001 CEB 1, at p. 10.) The objective severity of the harassment is judged from the perspective of a reasonable person in the complainant's position, considering all of the circumstances, and is guided by common sense and sensitivity to social context. (*Beyda v. City of Los Angeles*, *supra*, 65 Cal.App.4th at p. 517, citing *Oncale v. Sundowner Offshore Services, Inc.* (1998) 523 U.S. 75, 81; *Dept. Fair Empl. & Hous. v. Lactalis USA*,

Inc. (Nov. 4, 2002) No. 02-15-P, at p. 10 [2002 WL 31520127] (Cal. F.E.H.C.); *Dept. Fair Empl. & Hous. v. Jarvis, supra*, 2001, CEB 1, at p. 10.)

Complainant credibly testified that respondent Bottoms repeatedly sexually propositioned her, directed demeaning gender-specific insults to her from early February 2003 through her last day of employment, June 13, 2003, touched complainant's buttocks and thighs on several occasions, and posted a sign in the office linking complainant's employment with sexual relations with him. Bottoms persisted in this behavior despite complainant's repeated requests for him to stop.

Bottoms' behavior towards complainant after working hours was part of his attempts to pressure complainant to have a sexual relationship with him. He made incessant telephone calls to her at home at all hours, ostensibly to talk about work, but demanding to know her whereabouts, what she was doing, and whom she was with. He insisted that her fiancé could not stay with her. He called her in the middle of the night and asked her if he could come over. He made unannounced visits to her home, attempting to enter with his own key. He told her that he was watching her. All of this conduct took place in a context where Bottoms threatened that he could have complainant murdered if she reported his sexual demands.

These acts were severe, consisting of grabbing complainant's buttocks and demanding sex from complainant to keep her employment. They were also pervasive, in that they consisted of repeated and unremitting sexual epithets, sexual demands, and harassing conduct toward complainant both during and after work hours that made her work environment frightening and degrading. Respondent Bottoms' behavior left complainant nervous, upset, anxious, and fearful.

Accordingly, the Department established that respondent Bottoms subjected complainant to sexual harassment, both quid pro quo and a hostile work environment, in violation of Government Code section 12940, subdivision (j)(1). Respondent Bottoms is liable for sexually harassing complainant, pursuant to Government Code section 12940, subdivision (j)(3).

B. The Ralph Act

The Department asserts that respondent Bottoms is also liable for violating Civil Code section 51.7, the Ralph Civil Rights Act. The Department argues that respondent Bottoms repeatedly threatened complainant with death if she reported his sexual advances. Respondent Bottoms denies the charges, asserting that complainant's testimony is not credible and that he never threatened complainant.

Government Code section 12948 makes it unlawful, under the Fair Employment and Housing Act, for a person to violate the Ralph Act, Civil Code section 51.7. The Ralph Act provides, in relevant part, that all persons within California have the right to be free from any violence or threats of violence against their persons or property because of their sex.

A violation of the Ralph Act, as incorporated into FEHA through Government Code section 12948, is established if a preponderance of the evidence demonstrates that respondent engaged in violence or intimidation by threat of violence toward complainant and that there is a causal connection between complainant's sex and this violence or intimidation by threat. Sex need not be the dominant cause of respondent's violence or threats. A violation is established if such a factor was any part of the motivation for respondent's conduct. (*Dept. Fair Empl. & Hous. v. Lake County Dept. of Health Services* (1998) No. 98-11, FEHC Precedential Decs. 1998-1999, CEB 1, pp. 31-32, disapproved on another ground in *Carrisales v. Dept. of Corrections* (1999) 21 Cal.4th 1132, 1138-9, superseded by Stats. 1993, ch. 711, § 2.)

Complainant credibly testified that respondent Bottoms made threats that he could have her and her family murdered if she reported his sexual demands. Bottoms told complainant that he was the "King of Richmond" and could do whatever he wanted and thus contacting the police to complain about his behavior was futile. Bottoms also told complainant that he had someone murdered in the past. He further told complainant that he could have her fiancé Johnny Davis and her co-worker Keith Harris murdered. Bottoms made similar death threats directly to each man. Bottoms also threatened Pastor Wyndford Williams when Williams signed a declaration supporting complainant's request for a restraining order against Bottoms.

Bottoms also threatened complainant by stalking her. He told complainant that he was watching her, parked outside her home late at night, called her at all hours, attempted to come inside her home without her permission using his own key, and turned up inside her house without her permission.

Complainant testified that Bottoms' conduct—yelling sexual epithets at her, threatening to throw her out on the street if she did not sleep with him, grabbing her and knocking off her glasses in his car, and pursuing complainant in his car—was threatening to her and forced complainant repeatedly to flee from him. When complainant rejected Bottoms' sexual advances at the Lake Tahoe cabin in February 2003, he exploded in anger and yelled sexual epithets at her in a restaurant. After complainant retreated back to the Lake Tahoe cabin, he pursued her back to the cabin to continue to berate her. She left the cabin and Lake Tahoe to escape his angry conduct and epithets. In April 2003, while riding in a car together, Bottoms grabbed her, knocking off her glasses when she tried to get away from him. Complainant jumped out of the car to escape him. On June 13, 2003, complainant permanently left her job after Bottoms, supported by his armed security guard, Darren Williams, insisted that she have sex with Bottoms. Finally, four days later, Bottoms and Darren Williams pursued complainant in her car, blocking complainant's car with Bottoms'.

The record establishes that respondent Bottoms threatened complainant with death if she reported his sexually harassing conduct. Bottoms also threatened complainant with his

stalking and his intimidating conduct. These threats and conduct constitutes “intimidation by threat of violence . . . because of [complainant’s] sex” and constitute a violation of the Ralph Civil Rights Act.

Thus, the Department has established that respondent violated Civil Code section 51.7, as incorporated by Government Code section 12948.

C. Failure to Take All Reasonable Steps

The Department also charges that respondent Bottoms violated Government Code section 12940, subdivision (j)(1), by failing in his affirmative duty to take all reasonable steps necessary to prevent unlawful harassment and discrimination from occurring. As an employer, respondent Bottoms is obligated to “establish affirmative programs which include prompt and remedial internal procedures for handling sexual harassment complaints.” (*Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1 at pp. 28-29 [1990 WL 312871 (Cal.F.E.H.C.)].)

Complainant credibly testified that Bottoms refused to cease his sexual advances and physical conduct, despite repeated requests by complainant that he stop. Bottoms expressed his disdain for any need to prevent unlawful harassment by telling complainant that he would not stop his behavior and, if she did not like it, that she could “take [him] to court,” but that her complaints to authorities would be useless since he was the “King of Richmond.” Thus, Bottoms failed to take reasonable steps to prevent unlawful harassment from occurring, in violation of Government Code section 12940, subdivision (j)(1).³

Remedies

A. Make-Whole Relief

Having established that respondent sexually harassed complainant in violation of the FEHA and threatened complainant because of her sex in violation of the Ralph Act, the Department is entitled to an order of whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result of such harassment and threats. The Department must demonstrate the nature and extent of the resultant injury, and respondent Bottoms must demonstrate any bar or excuse he asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, §7286.9; *Dept. Fair Empl. & Hous. v. Madera County*, *supra*, 1990-1991, CEB 1, at p. 34.)

The Department’s accusation requested an award of complainant’s lost wages, out-of-pocket damages, compensatory damages for emotional distress, an administrative fine, a civil penalty, and affirmative relief.

³ The record did not establish whether respondent Bottoms had policies in place to respond to or prevent harassment or that he had posted the Department’s anti-discrimination poster.

1. Back Pay

The Department asserts that complainant was constructively discharged from her employment and thus is owed back pay from June 13, 2003, to January 2004. To establish a constructive discharge, an employee must plead and prove, by a preponderance of the evidence that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1251.)

The evidence of repeated sexual advances, death threats, and physical touchings from March 2003 to June 13, 2003, indicate intolerable working conditions sufficient to compel a reasonable employee to resign. The Department thus established that complainant was constructively discharged from her employment with respondent Bottoms on June 13, 2003.

Complainant was unemployed for 28.8 weeks from June 13, 2003 until she began a recycling business with her husband in January 2004. If she had remained working for respondent Bottoms during that time period, she would have earned \$450 per week, \$250 per week of which was credited toward her rent. After June 13, 2003, complainant continued to live at respondent Bottoms' El Sobrante house for another two weeks, with a rent credit of \$500. Thereafter, she moved out, and thus no further rent credit is warranted. Thus, complainant is owed \$12,486. (28.8 weeks times \$450 per week equals \$12,986 minus \$500 rent credit equals \$12,486.) Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date the earnings accrued until the date of payment. (Code Civ. Proc., § 685.010.)

2. Out-of-Pocket Damages

The Department did not establish any of complainant's expenses attributable to respondent Bottoms. No damages will be ordered for out-of-pocket losses.

3. Damages for Emotional Distress

The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, §12970, subds. (a) (3) and (a)(4).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job

and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (1988) No. 88-05, FEHC Precedential Decs. 1988-1989, CEB 4, pp. 10-14.)

When complainant first began working for respondent Bottoms, she thought that she had landed a great job. Instead, with respondent Bottoms' sexually harassing conduct and threats, the position became, in complainant's words, "the job from hell." Respondent Bottoms' sexually harassing conduct from February 2003 through July 2003, a period of six months, humiliated complainant, lowered her self esteem, and left her crying and distraught. Complainant's emotional distress resulting from respondent's conduct was evidenced by her own credible testimony, and that of her therapist Michael McAdoo, her minister Pastor Wyndford Williams, her husband Johnny Davis, and her co-worker Keith Harris, in all of whom complainant confided. Pastor Williams observed that complainant appeared "very broken" by respondent Bottoms' conduct, and always cried and was upset, jittery, nervous and fearful. McAdoo, Pastor Williams, Davis and Harris all testified to complainant's continuing upset and distress as a result of respondent's sexually harassing conduct.

Complainant was also adversely affected by respondent Bottoms' incessant telephone calls after working hours and stalking behavior. She was unable to sleep well, fearful that respondent Bottoms would arrive unannounced or call her in the middle of the night, and she frequently had nightmares which persisted through the date of hearing.

Finally, Bottoms' death threats to complainant, combined with his stalking behavior, traumatized complainant—to the extent that a year later her therapist Michael McAdoo diagnosed her as suffering from post traumatic stress syndrome. Through the date of hearing, Bottoms' death threats made complainant afraid to go out of her apartment and, when she did venture out, fearful that Bottoms was hiding inside when she returned.

Considering the facts and testimony elicited here in light of the factors set forth in Government Code section 12970, respondent Bottoms will be ordered to pay complainant \$100,000 in damages for her emotional distress: \$40,000 attributed to her emotional distress from Bottoms' sexual harassment and \$60,000 attributed to her emotional distress from Bottoms' threats and threatening conduct. Interest will accrue on this amount, at the rate of ten percent per year from the effective date of this decision until the date of payment. (Code Civ. Proc., § 685.010.)

B. Administrative Fine under the FEHA

The Department also seeks an order awarding an administrative fine to vindicate the purpose and policy of the FEHA. The Commission has the authority to order administrative fines pursuant to the FEHA where it finds, by clear and convincing evidence, a respondent "has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code." (Gov. Code § 12970, subd. (d).)

Here the Department established, by clear and convincing evidence, that respondent Bottoms' behavior toward complainant was not only unlawful, but was also vindictive, maliciously abusive and oppressive. Bottoms repeatedly subjected complainant to demands for sex, sexually harassing verbal abuse, as well as unwelcome physical conduct, notwithstanding her direct and continuous requests to him to stop. Indeed, Bottoms told complainant that he had no intention to stop his sexual demands, verbal abuse, and conduct; she could either have sex with him or lose her job. Bottoms' behavior was malicious and despicable, with a willful and conscious disregard for complainant's rights to be free from sexual harassment. The behavior was also oppressive, subjecting complainant to cruel and unjust hardship and a hostile working environment in conscious disregard of complainant's rights. This continuing course of unlawful conduct in violation of the FEHA warrants an administrative fine in the amount of \$30,000, payable to the state's General Fund. (Civ. Code § 3294; Gov. Code § 12970, subd. (d).) Interest will accrue on this amount at the rate of ten percent per year, from the effective date of this decision until the date of payment. (Code Civ. Proc., § 685.010.)

C. Civil Penalty for Ralph Act Violation

The Department also seeks a civil penalty in an amount the Commission deems appropriate for respondent Bottoms' violation of Government Code section 12948, which incorporates the Ralph Act into the FEHA. Government Code section 12970, subdivision (e), provides that the Commission may assess against the respondent a civil penalty of up to \$25,000.

A Ralph Act civil penalty vindicates the purposes and policies of the FEHA. The Ralph Act, as incorporated into the FEHA, was designed to protect persons, such as complainant, from gender-based threats of violence or intimidation (Civ. Code, § 51.7) and to ensure that worksites are free from harassment and discrimination. (Stats. 1984, ch. 1754, § 1, p. 1170; *Dept. Fair Empl. & Hous. v. Lake County Dept. of Health Services*, *supra*, 1998, CEB 1, at p. 37.) In this case, a civil penalty vindicates these purposes. Bottoms repeatedly threatened complainant with death if she reported his sexual abuse. He stalked complainant and told her that he was watching her. And, the threatening conduct which formed the basis of respondent Bottoms' Ralph Act violation created a work environment laden with gender-based hostility. Accordingly, pursuant to Government Code section 12970, subdivision (e), respondent Bottoms will be ordered to pay \$25,000 as a civil penalty for his violation of the Ralph Civil Rights Act, as an unlawful practice under the FEHA. Interest will be due on this amount running from the effective date of this decision to the date of payment at the rate of ten percent per year. (Code Civ. Proc., § 685.010.)

D. Affirmative Relief

The Department's accusation seeks a cease and desist order enjoining respondent

Bottoms from engaging in further acts of sexual harassment or threats. Such an order is appropriate under Government Code section 12970, subdivision (a). The Department also requests that respondent Bottoms be ordered to develop and implement an effective written policy against harassment which conforms with the provisions of the FEHA, to post a notice acknowledging respondent Bottoms' unlawful conduct toward complainant, and to undergo training on the rights and remedies provided by the FEHA regarding sexual harassment. These additional forms of relief are appropriate. (Gov. Code § 12970, subd. (a)(5).)

1. Anti-Harassment Policy

Respondent Bottoms will be ordered to develop and implement a policy that prohibits sexual harassment in compliance with the requirements of Government Code section 12940, subdivision (j)(1).

This policy must be given to all of respondent Bottoms' employees. It must, at a minimum, contain the following elements:

- a. a clear and comprehensive description of the kinds of conduct that constitutes sexual orientation harassment, and a forceful statement that such conduct is prohibited by respondent Bottoms' rules, and by state law;
- b. a clear statement of any employee's right to complain about sexual harassment without fear of retaliation, and a procedure for making such complaints;
- c. A procedure for promptly, fully, and objectively investigating complaints of sexual harassment to determine their merits; and,
- d. A statement that forceful and appropriate measures will be taken to punish offenders and redress the harm done to their victims.

2. Posting Policy and Notice

To inform its employees that unlawful sexual harassment is forbidden and that relief from these forms of unlawful conduct is available, respondent Bottoms will be ordered to post conspicuous copies of its written anti-harassment and discrimination policy. Respondent Bottoms will also be ordered to post a notice acknowledging its unlawful conduct (Attachment A) with a notice of employees' rights and obligations with regard to unlawful harassment under the FEHA (Attachment B).

3. Training Program

Respondent Bottoms will further be ordered to undergo interactive training about the

nature of prohibited harassment, the duty of all employers to prevent and eliminate harassment in the workplace, the procedures and remedies available under state law, and about the adverse impact of bias-motivated violence and other forms of discrimination. Respondent Kurt D. Bottoms shall seek advance approval of the form and content of the training from the Department and provide written certification of his completion of the training to the Department and Commission. (*Dept. Fair Empl. & Hous. v. Madera County, supra*, 1990-1991, CEB 1, at p. 40; *Dept. Fair Empl. & Hous. v. Del Mar Avionics* (Nov. 14, 1985) No. 85-19, at p. 34, FEHC Precedential Decs. 1984-85, CEB 16 [1985 WL 62898 (Cal.F.E.H.C.)].)

ORDER

1. Respondent Kurt D. Bottoms shall immediately cease and desist from harassment, violence, or intimidation by threats of violence based on sex.
2. Within 60 days of the effective date of this decision, respondent Kurt D. Bottoms shall pay to complainant Silverlene Bates back pay totaling \$12,486, together with interest on this amount at the rate of ten percent per year, compounded annually, from the effective date the earnings accrued to the date of payment.
3. Within 60 days of the effective date of this decision, respondent Kurt D. Bottoms shall pay to complainant Silverlene Bates actual damages for emotional distress in the amount of \$100,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.
4. Within 60 days of the effective date of this decision, respondent Kurt D. Bottoms shall pay to the state's General Fund an administrative fine in the amount of \$30,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.
5. Within 60 days of the effective date of this decision, respondent Kurt D. Bottoms shall pay to complainant Silverlene Bates a civil penalty in the amount of \$25,000, together with interest on this amount at the rate of ten percent per year, accruing from the effective date of this decision to the date of payment.
6. Within 10 days of the effective date of this decision, Kurt D. Bottoms shall sign notices which conform to Attachments A and B of this decision and shall post clear and legible copies of these notices in a conspicuous place where employees view employee notices. Posted copies of these notices shall not be reduced in size, defaced, altered, or covered by other material. The notice conforming to Attachment A shall be posted for a period of 90 working days. All copies conforming to Attachments B shall be posted permanently.

7. Within 60 days of the effective date of this decision, respondent Kurt D. Bottoms shall create and implement a written policy on unlawful harassment conforming to the description on page 21 of this decision. Respondent Kurt D. Bottoms shall give a copy of this policy to each employee and shall permanently post clear and legible copies of the policy next to all posted copies of the notice conforming to Attachments B. Posted copies of this policy shall not be reduced in size, defaced, altered, or covered by other material.

8. Within 60 days after the effective date of this decision, respondent Kurt D. Bottoms shall attend interactive training designed to educate him about prohibited sexual harassment, the procedures and remedies available under California law, and the adverse impact of bias-motivated violence and other forms of discrimination. Respondent Kurt D. Bottoms shall seek advance approval of the form and content of the training from the Department and provide written certification of his completion of the training to the Department and Commission.

9. Within 100 days after the effective date of this decision, respondent Kurt D. Bottoms shall in writing notify the Department and the Commission of the nature of his compliance with this order. Respondent shall also notify the Department and Commission of any change of address and telephone number.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent and complainant.

DATED: March 17, 2005

ANN M. NOEL
Administrative Law Judge

ATTACHMENT A

NOTICE TO ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WORKING FOR
KURT D. BOTTOMS

After a full hearing, the California Fair Employment and Housing Commission has found that Kurt D. Bottoms has violated the Fair Employment and Housing Act. (Dept. Fair Empl. & Hous. v. Kurt D. Bottoms, et al (2005) No. 05-____.)

As a result of this decision, Kurt D. Bottoms has been ordered to post this notice, and to take the following actions:

1. Cease and desist from harassment, violence, or intimidation by threats of violence based on sex.
2. Pay complainant back pay.
3. Pay a monetary award to the complainant for emotional distress.
4. Pay an administrative fine to the state's General Fund.
5. Pay a civil penalty to the complainant.
6. Post a statement of employees' rights and remedies under the Fair Employment and Housing Act.
7. Create and implement a formal written policy and training program on sexual harassment.

DATED: _____

BY: _____
Kurt D. Bottoms

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

NOTICE to ALL EMPLOYEES AND APPLICANTS FOR POSITIONS WITH KURT D. BOTTOMS

YOUR RIGHTS AND REMEDIES UNDER THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

YOU HAVE THE RIGHT TO BE FREE FROM UNLAWFUL EMPLOYMENT HARASSMENT and VIOLENCE OR INTIMIDATION BY THREATS OF VIOLENCE

The California Fair Employment and Housing Act prohibits harassment because of race, religious creed, color, national origin, ancestry, physical and mental disability, medical condition, marital status, sex, sexual orientation, and age. You have the right to be free of all such harassment in your workplace. Such harassment may take various forms, including:

VERBAL CONDUCT such as epithets, derogatory comments, slurs, unwanted sexual advances, invitations, comments, or name-calling

VISUAL CONDUCT such as derogatory posters, cartoons, drawings, gestures, or mimicking sexual acts

PHYSICAL CONDUCT such as assault, blocking normal movement, touching body parts or interference with work directed at you because of your sex, sexual orientation, or other protected basis

THREATS AND DEMANDS to submit to sexual requests in order to keep your job or avoid some other loss, and offers of job benefits in return for sexual favors

RETALIATION for having resisted or reported the harassment

The law prohibits any form of protected-basis harassment that impairs your working ability or emotional well-being at work. You may have a claim of harassment even if you have not lost your job or some other benefit.

You also have the right to be free in the workplace from violence, or intimidation by threats of violence, because of your race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute.

ATTACHMENT B

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YOU HAVE THE RIGHT TO COMPLAIN ABOUT SUCH HARASSMENT, THREATS, OR VIOLENCE AND GET RELIEF.

Kurt D. Bottoms has a policy against harassment which is posted next to this Notice. If you think you are being harassed on the job because of your sex, sexual orientation, race, ancestry or other protected basis, you should use the procedures outlined in this policy to file a complaint and have it investigated.

THE CALIFORNIA DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING investigates and prosecutes complaints of such harassment in employment. If you think you are being harassed or that you have been retaliated against for resisting or complaining about harassment, you may file a complaint with the Department at:

Department of Fair Employment and Housing
1515 Clay Street, Suite 701
Oakland, CA 94612
(510) 873-6457
or (800) 884-1684

The Department will investigate your complaint. If the complaint has merit, the Department will attempt to resolve it. If no resolution is possible, the Department will prosecute the case with its own attorney before the Fair Employment and Housing Commission or in court. The Commission or court may order the harassment stopped and can require your employer to reinstate you and to pay back wages and other out-of-pocket losses, damages for emotional injury, administrative fines or punitive damages, and other appropriate relief.

DATED: _____

BY: _____
Kurt D. Bottoms

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN PERMANENTLY POSTED IN THIS LOCATION AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.